Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

NO. _____

IN THE UNITED STATES SUPREME COURT

October Term, 1998

DON VICENTE MACIAS, INC.,

Petitioner

vs.

TEXAS GULF TRAWLING COMPANY, INCORPORATED; ZIMCO MARINE, INCORPORATED; AND MARINE RAILWAY, INC.,

Respondents

On Petition For Writ of Certiorari to The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

VICTORIA GUERRA, ESQUIRE
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COUNSEL OF RECORD FOR PETITIONER DON VICENTE MACIAS, INC.

September 07, 1999

98pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS ERRED BY AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT BECAUSE UNDER THE UNIQUE CIRCUMSTANCES DOCTRINE, PETITIONER, WHO HAD FILED A MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL, HAD BEEN AFFIRMATIVELY ASSURED THAT THE APPEAL WAS TIMELY FILED BY WRITTEN ORDER OF THE BANKRUPTCY COURT.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Don Vicente Macias, Inc. states that it has no parent corporation or non-wholly owned subsidiaries.

PARTIES TO THE PROCEEDING

The following is a listing of all parties to the proceeding in the court whose judgment is sought to be reviewed:

1. Don Vicente Macias, Inc., Petitioner.

2. Ciclon Negro, Inc., Cross-Appellee in appeal in U.S. Court of Appeals.

3. Patricio Ahumada, Jr., 53 Alan a Dale, Brownsville, Texas 78521, owner of 100 percent of stock of Don Vicente Macias, Inc. (Petitioner) and Ciclon Negro, Inc. (Cross-Appellee in U.S. Court of Appeals).

4. Antonio Villeda, 5414 N. 10th, McAllen, Texas 78504, attorney for Petitioner Don Vicente Macias, Inc. and Ciclon Negro, Inc. (Cross-Appellee in U.S. Court of Appeals) in bankruptcy court and

district court.

5. Kelly K. McKinnis, 520 Water Tower Centre, 612 Nolana Lop, McAllen, Texas 78504, attorney for Don Vicente Macias, Inc. and Ciclon Negro, Inc. (Cross-Appellee in U.S. Court of Appeals) in courts below.

6. J. Rolando Olvera, Jr., Hewitt, Fleming & Olvera, 1175 F.M. 802, Brownsville, Texas 78521-1567, attorney for Respondents Texas Gulf Trawling Co., Inc., Zimco Marine, Inc., and Marine Railway, Inc.

7. Texas Gulf Trawling Co., Inc., Respondent.

8. Zimco Marine, Inc., Respondent.

9. Marine Railway, Inc., Respondent.

10. RCA Travelers Maintenance & Supply, Inc., guarantor on note made the

basis of suit.

11. Walter Zimmerman, Port Isabel, Texas, principal of Respondents.

12. Harley Londrie, Port Isabel, Texas, principal of Respondents.

13. Richard Hoffman, Brownsville, Texas, bankruptcy court counsel for Petitioner.

14. Ed McAninch, Houston, Texas, post-judgment counsel in bankruptcy court for Patricio Ahumada, Jr.

15. Victoria Guerra, 605 E. Violet, Suite 2, McAllen, Texas 78504, counsel of record for Petitioner in the United States Supreme Court.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is set forth in the Appendix, p. a-52 and is reported at 168 F.3d 209. The Order of the United States Bankruptcy Court entered December 28, 1995 is unreported and set forth in the Appendix, p. a-6. The Order of the United States Bankruptcy Court denying as moot the motion for extension of time to file notice of appeal was entered on January 26, 1999, is unreported, and set forth in the Appendix, p. a-45. A petition for rehearing and motion for leave to supplement appellate record was timely filed on March 18, 1999 and set forth in the Appendix, p. a-56. The order denying the petition for rehearing was entered on April 7, 1999 and is set forth in the Appendix, p. a-72.

JURISDICTION

The statutory authority for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for rehearing on April 7, 1999. A pro se Petition was timely filed within 90 days of the panel rehearing denial, and on July 7, 1999 this Court granted a 60 day extension to file a Petition. The 60th day fell on a weekend or holiday, therefore this Petition was filed on the first business day after expiration of the 60th day of the extension and is thus timely.

PERTINENT CONSTITUTIONAL, STATUTORY, AND COURT RULE PROVISIONS

Rule 8002 of the Federal Rules of Bankruptcy Procedure provides in pertinent part as follows:

> **Rule 8002. Time for Filing Notice of Appeal.**
>
> (a) Ten-day period
>
> The notice of appeal shall be filed with the clerk within 10 days of the date of entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order

but before entry of the judgment, order or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(b) [omitted]

(c) Extension of time for appeal

(1) [omitted]

(2) A request to extend the time for filing a notice of appeal must be made by written motion filed before the time for filing a notice of

> appeal has expired, except that such a motion filed not later than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect. An extension of time for filing a notice of appeal may not exceed 20 days from the expiration of time for filing a notice of appeal otherwise prescribed by this rule or 10 days from the date of entry of the order granting the motion, whichever is later.

Rule 8002, Federal Rules of Bankruptcy Procedure.

STATEMENT OF THE CASE

This case originated in the U.S. Bankruptcy Court, Southern District of Texas, Brownsville Division, as part of the chapter 11 bankruptcy case styled In re Don Vicente Macias, Inc., bankruptcy number 94-21339-B-11 and a companion case, In re Ciclon Negro, Inc., bankruptcy case number 94-21338-B-11. Petitioner Don Vicente Macias, Inc. filed adversary proceeding numbers 94-2203-B and 95-2059-B, while Ciclon Negro, Inc. (Cross-Appellee below) filed adversary numbers 94-2102-B and 94-2204-B. The basis of said adversaries was the claim of Don Vicente Macias, Inc. and Ciclon Negro, Inc. that a lien provided on two vessels (the Don Vicente Macias and the Ciclon Negro) to Texas Commerce Bank and later assigned to Texas Gulf Trawling, Inc. was

a fraudulent conveyance of the Texas Uniform Fraudulent Transfer Act ("TUFTA"), Tex. Bus. & Com. Code Section 24.005, as well as in violation of 11 U.S.C. § 544. Don Vicente Macias, Inc. and Ciclon Negro, Inc. each objected to proofs of claim filed by Texas Gulf Trawling, Inc., asserting that the alleged liens were released by oral agreement between the principals of Don Vicente Macias, Inc. and Ciclon Negro, Inc. -- Pat Ahumada -- and the principals of Texas Gulf Trawling, Inc.

On July 15, 1995, the United States Bankruptcy Court For The Southern District of Texas, Brownsville Division, Richard S. Schmidt, J., signed a memorandum opinion and on December 19, 1995, said judge signed an order. The order signed on December 19, 1995 was entered by the clerk

on December 28, 1995. The memorandum opinion found (1) that Texas Gulf Trawling, Inc. was not a holder in due course as to the note and lien it acquired from Texas Commerce Bank, (2) that there was an agreement between the parties that Gulf Sea Shrimp, Inc. would obtain release of liens on Don Vicente Macias, Inc. and Ciclon Negro, Inc. from Texas Commerce Bank, (3) that the claim owed to Texas Gulf Trawling, Inc. was $300,000.00, the difference between the "value agreed upon for the six boats and the actual value." The order entered on 12-28-95 found that (1) no consideration was required to be given under section 3.408 of the Texas Business & Commerce Code, (2) TUFTA did not apply, (3) the principals of Texas Gulf Trawling, Inc. were partners with the principal of Don Vicente Macias, Inc. and

Ciclon Negro, Inc., and (4) Texas Gulf Trawling, Inc. had a valid lien in the amount of $300,000.00.

In adversary proceeding 95-2059-B, 94-2204-B, 94-2203-B, and 94-2102-B, all parties filed a Notice of Appeal and a Motion For Leave to Appeal. The district court denied relief on all of the appeals. Thereafter, notice of appeal to the United States Court of Appeals were filed. The appeals in three of the four adversaries were consolidated by the United States Court of Appeals into this case.

Thereafter, the United States Court of Appeals for the Fifth Circuit, Edith H. Jones, J., issued an opinion on March 04, 1999 which dismissed the appeal for want of jurisdiction. A petition for rehearing and motion for leave to supplement appellate record was filed on March 18,

1999, and was thereafter denied by order dated April 7, 1999.

ARGUMENT

I. THE COURT OF APPEALS ERRED BY AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT BECAUSE UNDER THE UNIQUE CIRCUMSTANCES DOCTRINE, PETITIONER, WHO HAD FILED A MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL, HAD BEEN AFFIRMATIVELY ASSURED THAT THE APPEAL WAS TIMELY FILED BY WRITTEN ORDER OF THE BANKRUPTCY COURT.

The U.S. Court of Appeals' opinion in the instant case dated March 4, 1999 sets for the basic facts of the case. Said opinion leaves out one very important fact, to-wit: On January 26, 1996, an order was entered by the Honorable Richard

S. Schmidt of the United States Bankruptcy Court, wherein he handwrote the following notation to the bottom of a proposed Order Granting Motion For Extension of Time to File Notice of Appeal: "Moot. Notice of Appeal was timely filed. /s/ Richard Schmidt." A copy of this order is included in the Appendix at p. a-45. Also, the bankruptcy court docket sheet reflects entry of such order. See p. a-2.

Petitioner respectfully disagrees with the portion of the March 4, 1999 opinion wherein it states that Don Vicente Macias, Inc. filed a motion for extension of time on February 12, 1996. In fact, the February 12, 1996 date appears to have been taken from the district court docket sheet. Petitioner submits that the February 12, 1996 date is the date that said documents were filed with the

district clerk, but would assert that the actual motion for extension of time was filed in the bankruptcy court on January 25, 1996. See p. a-42. This is confirmed by the fact that Judge Schmidt denied as moot on January 26, 1996 the motion for extension of time to file notice of appeal. The motion to extend time to file notice of appeal was filed on 1-25-96 and the notice of appeal was filed on 1-25-96 by Don Vicente Macias, Inc., as shown by the bankruptcy court docket sheet, attached hereto in the Appendix at page a-2.

Because the order in question was entered on 12-28-95, Petitioner had 10 days, i.e., until January 07, 1996 to file a notice of appeal under Bankruptcy Rule 8002(a). Under Bankruptcy Rule 8002(c), Petitioner had an additional 20 days from

January 7, 1996 to file a motion for extension of time to file a notice of appeal. On January 25, 1996 Petitioner filed a motion to extend time to file notice of appeal and a notice of appeal. The bankruptcy court by written order denied as moot the motion to extend time to file notice of appeal with the notation, "Notice of Appeal Timely filed." See the bankruptcy court docket sheet, attached hereto in the Appendix at page a-2.

In Thompson v. Immigration and Naturalization Service, 375 U.S. 385, 84 S.Ct. 397 (1964), the United States Supreme Court recognized the unique circumstances doctrine in vacating a judgment of the Court of Appeals and in remanding the case with instructions that the case be considered on its merits.

Thompson involved a situation where the petitioner performed an act, which, if properly done, postponed the deadline for filing of the appeal, and likewise involved a situation where the trial court concluded that the act had been properly done. 375 U.S. at 387; 84 S.Ct. at 398. In both Thompson and the case at bar, there was reliance upon the trial court's statement and filed the appeal "within the assumedly new deadline but beyond the old deadline." 375 U.S. at 389; 84 S.Ct. at 399.

In Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-179, 109 S.Ct. 987,992-993 (1989), the United States Supreme Court explained the unique circumstances doctrine and held that the Thompson rationale applied only where a party performed an act which, if properly done,

would postpone the deadline for filing an appeal and where the party had received specific assurances from a judicial officer that this act was properly done. In the case at bar, the order of January 26, 1996 shows that the bankruptcy judge below, the Honorable Richard S. Schmidt, gave assurance that the appeal notice was timely filed when he handwrote on the proposed order granting motion for extension of time to file notice of appeal the following notation: "Moot. Notice of Appeal was timely filed. /s/ Richard Schmidt."

Other cases have interpreted the unique circumstances doctrine. In Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 329 (9th Cir.1993), the U.S. Court of Appeals for the Ninth Circuit held that "Under the doctrine of unique

circumstances, an appellate court may consider an untimely appeal where "a court has affirmatively assured a party that its appeal will be timely [citations omitted]."

Petitioner filed a motion to extend time to file notice of appeal on January 25, 1996, which was within the period to do so under Bankruptcy Rule 8002(c). Because the bankruptcy court denied the motion as moot with the explanation, "Moot. Notice of Appeal Timely filed," Petitioner relied upon the representation of the bankruptcy court that the notice of appeal had been timely filed. The instant case therefore meets the requirements of the doctrine of unique circumstances, and therefore, in accordance with this Court's precedent, the decision of the United States Court of Appeals dismissing this

appeal should be reversed.

CONCLUSION

For the reasons stated herein, the United States Supreme Court should grant the Petition For Writ of Certiorari, reverse the judgment of the court below, order that the notice of appeal below shall be considered as timely under the unique circumstances doctrine, and remand the case back to the United State Court of Appeals For The Fifth Circuit for consideration of the other issues raised by Petitioner in said appeal.

Respectfully submitted,

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COUNSEL OF RECORD FOR PETITIONER DON VICENTE MACIAS, INC.

PACER/B, Southern District of Texas

Adversary proceeding 95-02059
Don Vicente Macias Inc v. Texas Gulf Trawling Co Inc et al.
Judge: Richard S Schmidt

Filed: 05/03/95 in Brownsville, Tx.
Closed: **/**/**
Case status: May 10, 1995 Awaiting Trial Hearing
Related to bankruptcy case 94-21339

Party	Attorney
Defendant Marine Railway Inc	Jose R Olvera, Jr Fleming & Hewitt 1175 FM 802 Brownsville, TX 78521-1567 210-982-4404
Defendant Texas Gulf Trawling Co Inc	Jose R Olvera, Jr Fleming & Hewitt 1175 FM 802 Brownsville, TX 78521-1567 210-982-4404
Defendant Zimco Marine Inc	Jose R Olvera, Jr Fleming & Hewitt 1175 FM 802 Brownsville, TX 78521-1567 210-982-4404

Plaintiff
Don Vicente Macias Inc

Richard S Hoffman
Attorney at Law
1718 Boca Chica Blvd
Brownsville, TX 78520
(512) 544-2345

---- Schedule and Deadline Information -

Mar 21 10:51 1996 Docket Entries Page 1

Docket Entries for case 95-02059

02/08/96 Doc # --- EOD 02/08/96
Certified Copy of Motion for Leave to Appeal and Docket Sheet to District Court Brownsville on 2/8/96

01/26/96 Doc #13-1 EOD 01/26/96
Order Mooting [12-1] Motion to Extend Time To File Notice of Appeal by Don Vicente Macias Inc (Notice of Appeal Timely filed) . Parties Notified

01/25/96 Doc #14-1 EOD 01/31/96
Certificate of Service by Richard S Hoffman for Plaintiff Don Vicente Macias Inc of [11-1] Motion For Leave to Appeal [9-1] Order by Richard S Hoffman

01/25/96 Doc #12-1 EOD 01/26/96
Motion By Plaintiff Don Vicente Macias Inc to Extend Time To

File Notice of Appeal

01/25/96 Doc #10-1 EOD 01/26/96
Notice of Appeal By Don Vicente Macias Inc RE: [9-1] Order (Appeal #96-08

01/19/96 Doc #11-1 EOD 01/26/96
Motion By Richard S Hoffman for Plaintiff Don Vicente Macias Inc For Leave to Appeal [9-1] Order (To District Court on 2/7/96

12/28/95 Doc #9-1 EOD 12/28/95
Order Granting in Part, Denying in Part [1-1] Complaint NOS 435 Validity/Priority/Extent Lien. Parties Notified

07/07/95 Doc #8-1 EOD 07/12/95
Defendant Texas Gulf Trawling Co Inc Witness List

07/07/95 Doc #0-1 EOD 07/12/95
(RSS) Under Advisement [4-1] Motion to Expedite Hearing Re: (Debtors Complaint to Sell Free and Clear or Borrow and on Debtors Objection to Creditor's Proof of Claim) by Richard S Hoffman. Parties Notified

07/07/95 Doc #7-1 EOD 07/12/95
Hearing Held Re: [4-1] Motion to Expedite Hearing Re (Debtors Complaint to Sell Free and Clear or Borrow and On Debtors Objection to Creditor's Proof of Claim) by Richard S Hoffman. Witnesses Presented. Court

Denies Request to Allow Deposition of Victor De Constanza. Court Heard Oral Arguments. Court Takes Under Advisement Whether to Consider Testimony Presented

07/06/95 Doc #6-1 EOD 07/10/95
Hearing Held 7/6/95 Re: [4-1] Motion to Expedite Hearing Re:(Debtors Complaint to Sell Free and Clear or Borrow

and On Debtors Objection to Creditor's Proof of Claim) by Richard S Hoffman Continued to 9:30 7/7/95 at 500 E. 10th Brownsville. After Hearing Arguments On Debtor's Oral Motion to Consider Hearing The Testimony of Victor De Constanza and John Reed, Court Continues Hearing For 7/7/95 To Allow Them to Appear. Debtor Is Requesting That Said Testimony Be Added To The Argument Of Debtor's Objection To Creditor's Proof of Claim That Is Under Submission

06/29/95 Doc #5-1 EOD 06/29/95
Order to Set Hearing RE: [4-1] Motion to Expedite Hearing Re: (Debtors Complaint to Sell Free and Clear Or Borrow and On Debtors Objection to Creditor's Proof of Claim) by Richard s

Hoffman Scheduled 9:00 7/6/95 at 500 E. 10th Brownsville Parties Notified

06/26/95 Doc #4-1 EOD 06/27/95
Motion by Richard S Hoffman for Plaintiff Don Vicente Macias Inc To Expedite Hearing Re: (Debtors Complaint To Sell Free and Clear or Borrow and On Debtors Objection To Creditor's Proof of Claim). m/d 6/27/95

05/10/95 Doc #3-1 EOD 05/15/95
Answer to Complaint by J. Rolando Olvera Jr. for Defendant Marine Railway Inc, Defendant Zimco Marine Inc, Defendant Texas Gulf Trawling Co Inc. copy:gm

05/10/95 Doc #2-1 EOD 05/10/95
Comprehensive Discovery, Mediation and Scheduling Order Parties Notified

05/05/95 Doc # --- EOD 05/05/95
Summons sent to Hoffman to be completed and returned for issuance

05/03/95 Doc #1-1 EOD 05/05/95
Complaint (95-2059) Don Vicente Macias Inc vs. Texas Gulf Trawling Co Inc. NOS 435 Validity/Priority/Extent Lien (Filing Fee $120.00 Receipt # 908160

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ENTERED
DEC 28 1995

IN RE:	§	
	§	
CICLON NEGRO, INC.	§	Case No.
	§	94-21338-B-11
	§	
DON VICENTE MACIAS, INC.	§	Case No.
	§	94-21339-B-11

---

	§	
CICLON NEGRO, INC.	§	
Plaintiff	§	
	§	
v.	§	Adversary No.
	§	94-2102-B
	§	
ZIMCO MARINE, INC.	§	
Defendant	§	
	§	
	§	
DON VICENTE MACIAS, INC.	§	
Plaintiff	§	
	§	
v.	§	Adversary No.
	§	94-2203-B
	§	
TEXAS GULF TRAWLING CO.,	§	
INC., ET AL.	§	
Defendant	§	
	§	
CICLON NEGRO, INC.	§	
Plaintiff	§	
	§	
v.	§	Adversary No.
	§	94-2204-B
	§	

TEXAS GULF TRAWLING CO., INC., ET AL. Defendant	§	
DON VICENTE MACIAS, INC. Plaintiff	§	
v.	§	**Adversary No. 95-2059-B**
TEXAS GULF TRAWLING CO., INC., ET AL. Defendant	§	

ORDER

On this day came on for consideration the above referenced adversary proceedings. By a Memorandum Opinion dated July 13, 1995, and entered on July 14, 1995, the Court has previously ruled concerning the objection to Proofs of Claim filed by Texas Gulf Trawling Co., Inc. in the above two referenced bankruptcy cases. The Findings of Fact and Conclusions of Law contained in the Memorandum Opinion are incorporated herein by reference. Paragraph 2 of the Findings

of Fact in said Opinion references the adversaries challenging the efficacy of the security agreements described herein. These adversaries are those described in that paragraph.

ADDITIONAL FINDINGS OF FACT

1. Gulf Sea Shrimp, Inc. ("Gulf") executed a promissory note dated April 11, 1988 in the original principal sum of $600,000.00 payable to Texas Commerce bank. This note was subsequently renewed in January 1989, March 1989, April 1989, April 1990, June 1990, May 1991, November 1991, May 1992, May 1993, and finally renewed November 1993 in the principal amount of $439,329.10.

2. Ciclon Negro, Inc. ("Debtor") executed a Continuing Guaranty for the benefit of Texas Commerce Bank which guaranteed the prompt and complete payment

of the Gulf promissory note described in Additional Finding of Fact No. 1. This Continuing Guaranty was dated October 30, 1990, and was subsequently renewed and extended on June 16, 1993.

3. On September 3, 1991, Debtor executed a First Preferred Ship's Mortgage for the benefit of Texas Commerce Bank granting a lien against the F/V Ciclon Negro, official no. 543395 in the amount of $600,000.00.

4. At the time of the execution of the First Preferred Ship's Mortgage by Debtor as described in Additional Finding of Fact No. 3, there existed an antecedent debt to Texas Commerce bank in the amount of $600,000.00 and such debt was guaranteed by Debtor.

5. At no time from April 11, 1988, through calendar year 1994, were Texas

Commerce Bank and/or Texas Gulf Trawling indebted to Debtor.

6. On April 22, 1994, Texas Commerce Bank sold to Texas Gulf Trawling the promissory note, as renewed, described in Additional Finding of Fact No. 1.

7. The First Preferred Ship's Mortgage described in Additional Finding of Fact No. 3 was assigned by Texas Commerce bank to Texas Gulf Trawling on April 22, 1994.

ADDITIONAL CONCLUSIONS OF LAW

1. On September 3, 1991, the Debtor's execution of a First Preferred Ship's Mortgage granting a lien on the F/V Ciclon Negro secured an antecedent debt guaranteed by the Debtor and no consideration to Debtor was required pursuant to the Texas Business & Commerce Code, Section 3.408. The guarantee

executed by Debtor recites and acknowledges receipt of good and valuable consideration.

2. The Texas Fraudulent Transfer Act ("TFTA") does not apply to the creation of a mortgage unless the mortgage adversely affects a complaining creditor. The debtor has no remedy under TFTA to challenge the mortgage granted Texas Commerce bank by the First Preferred Ship's Mortgage dated September 3, 1991.

3. The principals of Texas Gulf Trawling are partners with the principals of the Debtors herein.

4. Texas Gulf Trawling partners are limited to the actual amount owed by the Debtors to Texas Gulf Trawling.

5. Texas Gulf Trawling has a valid lien against the subject vessels in the amount of $300,000.00, the amount of its

claim against the Debtors herein.

Corpus Christi, Texas, this 19th day of December, 1995.

/s/ Richard S. Schmidt
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FILED
JAN 19 1996

IN RE:	)	CASE NO.
	)	94-21339-B-11
DON VICENTE, INC.	)	
Debtor	)	
	)	
DON VICENTE, INC.	)	ADVERSARY NO.
Plaintiff	)	95-2059-B
	)	
v.	)	
	)	
TEXAS GULF TRAWLING CO., INC. ET AL	)	
Defendants	)	

MOTION FOR LEAVE TO APPEAL

TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, BROWNSVILLE DIVISION:

Pursuant to 28 U.S.C.A. Section 158(a), DON VICENTE, INC., by the undersigned attorney, moves for leave to appeal from the Memorandum Opinion, Findings of Fact and Conclusions of Law of the Bankruptcy Court described herein, and prays of such other and further relief as

is just and proper. In support of this Motion, DON VICENTE, INC. would show the Court as follows:

I.

Attached hereto as Exhibit "A" and incorporated by reference as if set forth herein is a copy of the Memorandum Opinion issued by the Bankruptcy Court, July 25, 1995 and an order and additional Findings of Fact and Conclusions of Law signed on December 19, 1995. In addition, attached hereto as Exhibit "B" and incorporated by referenced as if set forth herein is a copy of the Notice of Appeal.

II.

The relevant facts on appeal are:

Debtor filed for reorganization under chapter 11 of the Bankruptcy Code on July 20, 1994. Texas Gulf Trawling Co., Inc. (hereafter TGT) filed a proof of claim

against Debtor. The Prof of claim was based on TGT's allegation that it was a purchaser and holder in due course of a note of Texas Commerce Bank and that Texas Commerce bank allegedly had a First Preferred Ship Mortgage from Debtors collaterizing a shrimp vessels owned by Debtor.

Debtor objected to the Proofs of claim since (1) no consideration was given for the collateral and since (2) TGT had agreed to effect release of the collateral upon settlement of another claim involving Gulf Sea Shrimp, Inc. (hereafter Gulf Seas), Laguna Azul and Patricio Ahumada. Debtor also filed an adversary based on violation of the Texas Fraudulent Transfer Act ("TFTA") alleging that creditor fraudulently caused debtor to incumber property of the estate to the detriment of

debtor and other creditors.

For an understanding of the question presented, it is necessary to refer to various parties:

Gulf Seas is a corporation owned by Patricio Ahumada (50%), Walter Zimmerman (25%) and Harley Londrie (25%). Ahumada is the owner of Don Vicente, Inc., (the debtor corporation), Walter Zimmerman and Harley Londrie are owners of the corporation that owns/controls TGT. Lagunza Azul is a Mexican corporation that was indebted to Gulf Seas.

At the time the shrimping vessel Don Vicente, Inc. was collateralized, the Note from which the collateral was given had been executed and performing for several years. Texas Commerce Bank did not ask for collateral nor did it give anything of value to either debtor when debtors signed

preferred mortgages.

Ahumada and Londrie traveled to Mexico to effect a settlement for Gulf Seas in a claim against Laguna Azul. Ahumada has spent considerable sums of his money in negotiating the settlement and agreed to relinquish the benefit accruing to him as 50% owner of Gulf Seas. In return for (1) cancellation of debt of Don Vicente to TGT and tow other corporations owned/controlled by Londrie and Zimmerman and (2) release of collateral (vessels) held by Texas Commerce Bank.

Ahumada relinquished his interest in the settlement proceeds (six vessels valued at $1,200,000.00). All proceeds were transferred to yet another corporation (Seis Cruces) but all benefit has accrued to TGT.

TGT subsequently purchased the Note of Texas Commerce bank and foreclosed on the shrimping vessels of debtors.

III.

The questions to be answered in the pending action are:

1. Was consideration given for the collateral of debtors?

2. Was TGT a purchaser/holder in due course?

3. Was there an agreement made between the parties to effect release of debtor's collateral?

4. What was the value of the vessels received by Gulf Seas from Laguna Azul?

5. Did TGT have a claim in any amount against debtors and what amount, if any?

The Bankruptcy Court properly found

that TGT was not a holder in due course and that there was in fact an agreement between the parties to effect the release of the vessels.

IV.

The relief sought by debtors is modification of the order with a finding that no consideration was given for the collateral and that TGT has therefore, no claim against debtors. From the most recent findings of fact, debtor seeks an additional finding that the value of Gulf Seas-Laguna Azul settlement had a value exceeding $1,000,000,00 and that the value wrongfully accrued to the benefit of Texas Gulf Trawling Co., Inc.

An Appeal should be granted since the evidence was clear that no consideration was given for the collateral in question and that the value of the vessels received

by Gulf Seas in settlement of the Gulf Seas -Laguna Azul settlement exceeded $1,000,000.00, an amount that more than offsets any debt debtor may have owed to creditor. Based on this and on the other findings of the Court no claim should be allowed TGT.

Respectfully submitted,

LAW OFFICE/RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520
210/544-2345 Fax: 210/982-1909

/s/ Richard S. Hoffman
RICHARD S. HOFFMAN, FED ID#6147

EX A

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:	§	
	§	Case No.
CICLON NEGRO, INC.	§	94-21338-B-11
	§	
DON VICENTE, INC.	§	Case No.
	§	94-21339-B-11
	§	
DEBTORS.	§	

MEMORANDUM OPINION

Before the Court is the Objection to the Prof of Claim filed by Texas Gulf Trawling Company, Inc.

FINDINGS OF FACT

1. Ciclon Negro, Inc. and Don Vicente, Inc. filed Voluntary Petitions for Reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1994.

2. Texas Gulf Trawling Co., Inc. ("Texas Gulf Trawling") has filed a Proof of Claim against Debtors in the amount of

Three Hundred Seventy Thousand Eight Hundred Four and 36/100ths ($370,804.36) Dollars. These claims arise out of a First Preferred Ship Mortgage created by the Debtors mortgaging two shrimp boats (the Don Vicente and the Ciclon Negro) in favor of the Texas Commerce Bank as purported security for a note described below. The efficacy of this security agreement has been challenged by the Debtors in two adversaries and is not decided by this claims objection.

3. Debtor has objected to the Proofs of Claim based on the allegation that the debt to Texas Gulf Trawling was dismissed via a settlement between two unrelated third parties, specifically a Texas corporation by the name of Gulf Sea Shrimp, Inc. ("Gulf Sea Shrimp"), and a foreign Mexican corporation by the name of

Socied Cooperativa de Producion Pesquera de Alatura Laguna Azul S.C.L. ("Laguna Azul"). No written documentation exists wherein either Texas Commerce Bank, Walter Zimmerman or Harley Londrie agreed to extinguish the debt or First Preferred Ship Mortgage created by Debtors.

4. Gulf Sea Shrimp was incorporated for the purpose of purchasing shrimp in Mexico. The original shareholders as of the original date of incorporation along with their respective interests were as follows:

a. Patricio Ahumada - Fifty (50%) Percent;

b. Walter Zimmerman - Twenty-five (25%) Percent;

c. Harley Londrie - Twenty-five (25%) Percent.

5. On April 11, 1988, Gulf Sea

Shrimp began to borrow money in the original principal sum of Six Hundred Thousand and no/100ths ($600,000.00) Dollars from Texas Commerce Bank in order to operate its business which consisted of purchasing shrimp from Mexico and reselling said shrimp in the United States. Over the span of years in which Gulf Sea Shrimp was borrowing money from Texas Commerce Bank, Gulf Sea Shrimp was also borrowing money from Texas Gulf Trawling in order to make payments on the principal and interest owed to Texas Commerce Bank.

6. The last Promissory Note between Gulf Sea Shrimp and Texas Commerce Bank was dated November 30, 1993, with a maturity date of April 29, 1994 in the amount of Four Hundred Thirty-nine Thousand Three Hundred Twenty-nine and

10/100ths ($439,329.10) Dollars.

7. In the same time period, it was owed over one million dollars by Laguna Azul, a Mexican Co-op, which was secured by fourteen shrimping vessels owned by Laguna Azul.

8. In order to collect the debt from Laguna Azul, Harley Londrie, Patricio Ahumada, Rafael Garcia (a Mexican attorney) and others met in Campeche, Mexico, on February 8th and 9th, 1993. An agreement was reached between Gulf Sea Shrimp, Inc. and Laguna Azul, allowing Gulf Sea Shrimp, Inc. to select six vessels of choice in return for satisfaction of the Laguna Azul debt. In addition to the recited settlement agreement, Harley Londrie, as representative of Gulf Sea Shrimp, Inc. agreed to secure the release of the liens

on the Don Vicente and the Ciclon Negro held by Texas Commerce Bank in return for Patricio Ahumada surrendering any right or interest to the six vessels mentioned in the settlement agreement.

9. At the time the settlement agreement was entered into, in February 1993, Debtor's vessels had been mortgaged to Texas Commerce Bank since September, 1991.

10. At the time the settlement agreement was entered into, Gulf Sea Shrimp had agreed to select six vessels appearing on an appraisal performed approximately in February 1992 wherein 14 vessels were valued in excess of Two Million and no/100ths ($2,000,000.00) United States Dollars. The agreement was based upon the belief that the six vessels would total One Million and no/100ths

($1,000,000.00) Dollars in value.

11. Subsequent to the settlement, the six vessels received by Gulf Sea Shrimp were appraised once again in order to insure the vessels, and said appraisal evaluated the six vessels to be only worth Seven Hundred Thousand and no/100ths ($700,000.00) Dollars.

12. In the spring of 1994, a meeting of the Board of Directors of Gulf Sea Shrimp, Inc. was held. In a two-to-zero vote (Harley Londrie and Walter Zimmerman voting for and Patricio Ahumada abstaining) the board voted to pay its debt to Texas Gulf Trawling, Zimco Marine, Inc., and Marine Railway, Inc. The only unpaid debt of gulf Sea Shrimp, Inc. was the note originally held by Texas Commerce Bank.

13. Harley Londrie and Walter

Zimmerman with their positions on the board of Gulf Sea Shrimp, Inc. were on the board of directors of each of the companies that did get paid, and purchased Texas Commerce Bank note through Texas Gulf Trawling, another corporation which they controlled.

CONCLUSIONS OF LAW

1. Texas Gulf Trawling is not a holder in due course because it is controlled by individuals who were participants in the settlement agreement described above. The controlling parties at all times relevant knew of any defenses to the note.

2. The Court concludes that there was an agreement between the parties to release the Don Vicente and the Ciclon Negro by payment of the debt originally owed to Texas Commerce Bank by Gulf Sea

Shrimp, Inc.

3. Texas Gulf Trawling is entitled to a claim in the amount of Three Hundred Thousand and no/100ths ($300,000.00) dollars -- the difference between the value agreed upon for the six boats and the actual value.

Corpus Christi, Texas this 25th day of July, 1995.

/s/Richard S. Schmidt
RICHARD S. SCHMIDT
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ENTERED
DEC 28 1995

IN RE:	§	
	§	
CICLON NEGRO, INC.	§	**Case No.**
	§	**94-21338-B-11**
	§	
DON VICENTE MACIAS, INC.	§	**Case No.**
	§	**94-21339-B-11**

---

	§	
CICLON NEGRO, INC.	§	
Plaintiff	§	
	§	
v.	§	**Adversary No.**
	§	**94-2102-B**
ZIMCO MARINE, INC.	§	
Defendant	§	
	§	
	§	
DON VICENTE MACIAS, INC.	§	
	§	
Plaintiff	§	
	§	
v.	§	**Adversary No.**
	§	**94-2203-B**
	§	
TEXAS GULF TRAWLING CO., INC., ET AL.	§	
	§	
Defendant	§	
	§	
CICLON NEGRO, INC.	§	
Plaintiff	§	
	§	
v.	§	**Adversary No.**
	§	**94-2204-B**
	§	

TEXAS GULF TRAWLING CO.,INC., ET AL. Defendant	**§**	
DON VICENTE MACIAS, INC. Plaintiff	**§**	
v.	**§**	**Adversary No. 95-2059-B**
TEXAS GULF TRAWLING CO., INC., ET AL. Defendant	**§**	

ORDER

On this day came on for consideration the above referenced adversary proceedings. By a Memorandum Opinion dated july 13, 1995, and entered on July 14, 1995, the Court has previously ruled concerning the objection to Proofs of Claim filed by Texas Gulf Trawling Co., Inc. in the above two referenced bankruptcy cases. The Findings of Fact and Conclusions of Law contained in the Memorandum Opinion are incorporated herein by reference. Paragraph 2 of the Findings

of Fact in said Opinion references the adversaries challenging the efficacy of the security agreements described herein. These adversaries are those described in that paragraph.

ADDITIONAL FINDINGS OF FACT

1. Gulf Sea Shrimp, Inc. ("Gulf") executed a promissory note dated April 11, 1988 in the original principal sum of $600,000.00 payable to Texas Commerce bank. This note was subsequently renewed in January 1989, March 1989, April 1989, April 1990, June 1990, May 1991, November 1991, May 1992, May 1993, and finally renewed November 1993 in the principal amount of $439,329.10.

2. Ciclon Negro, Inc. ("Debtor") executed a Continuing Guaranty for the benefit of Texas Commerce Bank which guaranteed the prompt and complete payment

of the Gulf promissory note described in Additional Finding of Fact No. 1. This Continuing Guaranty was dated October 30, 1990, and was subsequently renewed and extended on June 16, 1993.

3. On September 3, 1991, Debtor executed a First Preferred Ship's Mortgage for the benefit of Texas Commerce Bank granting a lien against the F/V Ciclon Negro, official no. 543395 in the amount of $600,000.00.

4. At the time of the execution of the First Preferred Ship's Mortgage by Debtor as described in Additional Finding of Fact No. 3, there existed an antecedent debt to Texas Commerce bank in the amount of $600,000.00 and such debt was guaranteed by Debtor.

5. At no time from April 11, 1988, through calendar year 1994, were Texas

Commerce Bank and/or Texas Gulf Trawling indebted to Debtor.

6. On April 22, 1994, Texas Commerce Bank sold to Texas Gulf Trawling the promissory note, as renewed, described in Additional Finding of Fact No. 1.

7. The First Preferred Ship's Mortgage described in Additional Finding of Fact No. 3 was assigned by Texas Commerce bank to Texas Gulf Trawling on April 22, 1994.

ADDITIONAL CONCLUSIONS OF LAW

1. On September 3, 1991, the Debtor's execution of a First Preferred Ship's Mortgage granting a lien on the F/V Ciclon Negro secured an antecedent debt guaranteed by the Debtor and no consideration to Debtor was required pursuant to the Texas Business & Commerce Code, Section 3.408. The guarantee

executed by Debtor recites and acknowledges receipt of good and valuable consideration.

2. The Texas Fraudulent Transfer Act ("TFTA") does not apply to the creation of a mortgage unless the mortgage adversely affects a complaining creditor. The debtor has no remedy under TFTA to challenge the mortgage granted Texas Commerce bank by the First Preferred Ship's Mortgage dated September 3, 1991.

3. The principals of Texas Gulf Trawling are partners with the principals of the Debtors herein.

4. Texas Gulf Trawling partners are limited to the actual amount owed by the Debtors to Texas Gulf Trawling.

5. Texas Gulf Trawling has a valid lien against the subject vessels in the amount of $300,000.00, the amount of its

claim against the Debtors herein.

Corpus Christi, Texas, this 19th day of December, 1995.

/s/ Richard S. Schmidt
RICHARD S. SCHMIDT
United States Bankruptcy Judge

B IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

IN RE:	)	CASE NO.
	)	94-21339-B-11
DON VICENTE, INC.	)	
Debtor	)	
	)	
DON VICENTE, INC.	)	ADVERSARY NO.
	)	95-2059-B
Plaintiff	)	
	)	
v.	)	
	)	
TEXAS GULF TRAWLING	)	
CO., INC. ET AL	)	
Defendants	)	

NOTICE OF APPEAL

DON VICENTE MACIAS, INC., Debtor and Plaintiff in the above-referenced adversary proceedings appeal to the District Court from the final Order of the Bankruptcy Court entered in the above adversary proceedings on the 19th day of December, 1995. The parties to the Order appealed from and the names and addresses of their respective attorneys are as follows:

Mr. Tom Fleming
FLEMING, HEWITT & OLVERA
1175 F.M. 802
Brownsville, Texas 78521

ATTORNEY FOR TEXAS GULF TRAWLING CO., INC. and ZIMCO MARINE, INC.

and

Mr. Richard S. Hoffman
LAW OFFICE OF RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520

ATTORNEY FOR DON VICENTE, MACIAS, INC.

Respectfully submitted,

LAW OFFICE/RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520
210/544-2345 Fax: 210/982-1909

/s/Richard S. Hoffman
RICHARD S. HOFFMAN, FED ID#6147

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been served on opposing counsel by U.S. Certified mail, return receipt requested, on this 19 day of January, 1996, to-wit: Mr. Tom Fleming, FLEMING, HEWITT & OLVERA, 1175 F.M. 802, Brownsville, Texas 78521.

/s/Richard S. Hoffman
Richard S. Hoffman

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FILED
JAN 25 1996

IN RE:	)	CASE NO.
	)	94-21339-B-11
DON VICENTE, INC.	)	
Debtor	)	
DON VICENTE, INC.	)	ADVERSARY NO.
	)	95-2059-B
Plaintiff	)	
v.	)	
TEXAS GULF TRAWLING CO., INC. ET AL	)	
Defendants	)	

NOTICE OF APPEAL

DON VICENTE MACIAS, INC., Debtor and Plaintiff in the above-referenced adversary proceedings appeal to the District Court from the final Order of the Bankruptcy Court entered in the above adversary proceedings on the 19th day of December, 1995. The parties to the Order appealed from and the names and addresses

of their respective attorneys are as follows:

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FLEMING, HEWITT & OLVERA
1175 F.M. 802
Brownsville, Texas 78521

ATTORNEY FOR TEXAS GULF TRAWLING CO., INC. and ZIMCO MARINE, INC.

and

Mr. Richard S. Hoffman
LAW OFFICE OF RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520

ATTORNEY FOR DON VICENTE, MACIAS, INC.

Respectfully submitted,

LAW OFFICE/RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520
210/544-2345 Fax: 210/982-1909

/s/Richard S. Hoffman
RICHARD S. HOFFMAN, FED ID#6147

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been served on opposing counsel by U.S. Certified mail, return receipt requested, on this 25 day of January, 1996, to-wit: Mr. Tom Fleming, FLEMING, HEWITT & OLVERA, 1175 F.M. 802, Brownsville, Texas 78521.

/s/Richard S. Hoffman
Richard S. Hoffman

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FILED
JAN 25 1996

IN RE:	)	CASE NO.
	)	94-21339-B-11
	)	
DON VICENTE, INC.	)	
Debtor	)	
	)	
DON VICENTE, INC.	)	ADVERSARY NO.
	)	95-2059-B
Plaintiff	)	
	)	
v.	)	
	)	
TEXAS GULF TRAWLING CO., INC. ET AL	)	
Defendants	)	

MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES DON VICENTE MACIAS, INC., Debtor, and files this its Motion for Extension of Time to File Notice of Appeal in the above referenced adversary proceedings, and as grounds thereof would respectfully show as follows:

I.

On December 19, 1995, this Court entered its Order and Findings of Fact and Conclusions of Law in the above matters. The Order was postmarked December 29, 1995 and was not received by the Debtors and their attorney until on or after January 2, 1996, nor were Debtors or their attorney advised of the Court's ruling until receipt of the written order. Debtors wish to appeal the Court's ruling, and since the only reason for their failure to file a notice of appeal within ten (10) days after entry of the Court's Order was because of their failure to receive the Order within the time period, Debtors respectfully request that the Court grant an extension of time to file the notice of appeal, which notice is filed contemporaneously herewith.

WHEREFORE, Debtor prays that this motion be granted.

Respectfully submitted,

LAW OFFICE/RICHARD S. HOFFMAN
1718 Boca Chica Blvd.
Brownsville, Texas 78520
210/544-2345 Fax: 210/982-1909

/s/Richard S. Hoffman
RICHARD S. HOFFMAN, FED ID#6147

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing motion has been served on opposing counsel by U.S. Certified mail, return receipt requested, on this ____ day of January, 1996, to-wit: Mr. Tom Fleming, FLEMING, HEWITT & OLVERA, 1175 F.M. 802, Brownsville, Texas 78521.

/s/Richard S. Hoffman
Richard S. Hoffman

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ENTERED
JAN 26, 1996

IN RE:	)	CASE NO.
	)	94-21339-B-11
DON VICENTE, INC.	)	
Debtor	)	
	)	
DON VICENTE, INC.	)	ADVERSARY NO.
	)	95-2059-B
Plaintiff	)	
	)	
v.	)	
	)	
TEXAS GULF TRAWLING CO., INC. ET AL	)	
Defendants	)	

ORDER GRANTING MOTION
FOR EXTENSION OF TIME
TO FILE NOTICE OF APPEAL

On this day came on for consideration the Debtor's Motion For Extension of Time to File Notice of Appeal. The court having considered the same finds that this motion should be and is hereby granted.

It is therefore ORDERED that the Debtor's Motion For Extension of Time to

File Notice of Appeal is granted and Debtor is granted ____ days from the signing of this order to file their appeal.

SIGNED this _____ day of _____, 1996.

/s/Moot. Notice of Appeal was timely filed.
/s/Richard S. Schmidt
JAN 26 1996

_____
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

FILED
MAY 13 1998

IN RE:	§	
	§	
DON VICENTE, INC.,	§	
Debtor.	§	
	§	
DON VICENTE MACIAS, INC.,	§	NO. B-CV-96-022
Plaintiff	§	
	§	
v.	§	CHAPTER 11
	§	
TEXAS GULF TRAWLING CO., INC., ET AL.,	§	
	§	
Defendants	§	

ORDER DENYING DEBTOR LEAVE TO APPEAL

On this day came to be considered Debtor's Motion For Leave to File Appeal in the above-numbered cause. The Court, having carefully reviewed same, is of the opinion that said Motion should be **DENIED**.

This cause comes before the Court on the Debtor's Motion for Leave to appeal the order of the Bankruptcy Court entered july 25, 1995. The following Conclusions

of Law were ascertained by the Bankruptcy Court:

> 1. Texas Gulf Trawling is not a holder in due course of the note because it is controlled by individuals who were participants in the settlement agreement described above. The controlling parties at all times relevant knew of any defenses to the note.
>
> 2. The Court concludes that there was an agreement between the parties to release Don Vicente and the Don Vicente by payment of the debt originally owed to Texas Commerce bank by Gulf Sea Shrimp, Inc.
>
> 3. Texas Gulf Trawling is entitled to a claim in the amount of Three Hundred Thousand and no/100ths ($300,000.00) dollars -- the difference between the value agreed upon for the six boats and the actual value.

Don Vicente, Inc. ("Don Vicente"), Debtor herein, further appeals additional Conclusions of Law found by the Bankruptcy Court as listed in the Order dated December 19, 1995. The Debtor's contention on appeal is specifically

addressed therein: That there was no consideration given for Don Vicente's collateral and therefore Texas Gulf Trawling has no monetary claims against Debtor. The Bankruptcy Court, however, determined that there existed an antecedent debt guaranteed by Don Vicente which eliminated the consideration requirement per Texas Business & Commerce Code Section 3.408.

Leave may be granted if the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Per the Debtor's motion, the conclusions of law are mainly undisputed. The issues implicated in the contested

conclusions are fact intensive questions that do not qualify for an interlocutory appeal; there is neither a controlling issue of law or substantial ground for a difference of opinion on the relevant legal principles. Therefore, the issues implicated therein "rest within the sound discretion of the bankruptcy judge after a fact-intensive review." In re Global Marine, Inc., 108 B.R. 1007, 1009 (Bankr. S.D.Tex. 1988).

ACCORDINGLY, it is hereby **ORDERED, ADJUDGED, and DECREED**, that Debtor's Motion for Leave to File Appeal should be and is hereby **DENIED**. Moreover, the appeal in question is **Dismissed**, and the case is hereby **Remanded** for continued administration by the Bankruptcy Court.

IT IS SO ORDERED.

DONE at Brownsville, Texas this 13th

day of May, 1997.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-41191

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
Debtor.

DON VICENTE MACIAS, INCORPORATED,

Appellant-Cross-Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED; ZIMCO MARINE,
INCORPORATED; MARINE RAILWAY INCORPORATED,

Appellees-Cross-Appellants.

NO. 98-40029

IN THE MATTER OF: CICLON NEGRO, INC.,
Debtor.

CICLON NEGRO, INC.,

Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant.

NO. 98-40030

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
CICLON NEGRO, INC.,

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant,

versus

DON VICENTE MACIAS, INCORPORATED,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

---

March 4, 1999

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:

As part of the debtor's chapter 11 bankruptcy proceeding, Texas Gulf Trawling ("Texas Gulf") filed a proof of claim in

the amount of $370,000. In addition to objecting to the proof of claim, the debtors filed adversary proceedings challenging the secured status of Texas Gulf's proof of claim. In two separate proceedings, the bankruptcy court approved Texas Gulf's proof of claim in the amount of $300,000 and ruled that Texas Gulf held a valid lien in that amount. The bankruptcy court's first opinion, rendered in July 1995, was later incorporated into an opinion and final order entered on December 19, 1995.

According to the record, no party filed a notice of appeal within the ten day deadline prescribed by the Federal Rules of Bankruptcy Procedure. See Fed. R. Bank. Proc. 8002(a) ("The notice of appeal shall be filed with the clerk within 10 days of the entry of the judgment, order, or decree appealed from."). Appellant Ciclon Negro filed a Motion for Leave to Appeal on January 19, 1996 and attached as an appendix thereto a Notice of Appeal. In addition, appellant Don Vicente Macias filed a Motion For Leave to Appeal on February 12, 1996. Many months later, in May 1997, the district court denied the debtor's motions, dismissed the appeals, and remanded the matter to the bankruptcy court for continued administration. Under the circumstances, the remand order was superfluous, since refusal to grant the appeals made the bankruptcy court's decision final.

"Failure to file a timely notice [of appeal] deprives the district court of jurisdiction to consider the appeal."

Solomon v. Smith, 41 F.3d 1024, 1026 (5th Cir.1995). Because the district court did not have jurisdiction to review the merits, this court lacks jurisdiction over the merits raised on appeal by Don Vicente Macias and Texas Gulf. See Arbuckle v. First Nat'l Bank of Oxford, 988 F.2d 29, 32 (5th Cir.1993). We therefore affirm the district court's dismissal of the appeal.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-41191

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
Debtor.

DON VICENTE MACIAS, INCORPORATED,

Appellant-Cross-Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED; ZIMCO MARINE,
INCORPORATED; MARINE RAILWAY INCORPORATED,

Appellees-Cross-Appellants.

NO. 98-40029

IN THE MATTER OF: CICLON NEGRO, INC.,
Debtor.

CICLON NEGRO, INC.,
Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant.

NO. 98-40030

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
CICLON NEGRO, INC.,

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant,

versus

DON VICENTE MACIAS, INCORPORATED,

Appellee.

MOTION OF APPELLANT-CROSS APPELLEE/ APPELLEE DON VICENTE MACIAS, INC. AND APPELLEE CICLON NEGRO, INC. FOR REHEARING AND FOR LEAVE TO SUPPLEMENT THE APPELLATE RECORD

TO THE HONORABLE UNITED STATES COURT OF APPEALS:

COMES NOW DON VICENTE MACIAS, INC., Appellant-Cross-Appellee/ Appellee, and CICLON NEGRO, INC., Appellee, Movants, file this their Motion For Rehearing And

Motion For Leave to Supplement the Appellate Record, and in support thereof, would respectfully show:

1. On March 04, 1999, a three-judge panel comprised of the Honorable Edith Jones, the Honorable Jerry Smith, and the Honorable Emilio M. Garza by published opinion affirmed the orders and judgment of the district courts below which formed the basis of the instant appeal.

2. The gist of the opinion is that as no party filed a notice of appeal within ten days from the date of the order or judgment from which appeal is sought, then the district court was deprived of jurisdiction to hear the appeal as per Fed. R. Bank. Proc. 8002(a) and as per the holding of Solomon v. Smith, 41 F.3d 1024, 1026 (5th Cir. 1995).

3. Movants seek rehearing on the

following basis:

THE HONORABLE UNITED STATES COURT OF APPEALS ERRED IN AFFIRMING THE JUDGMENTS OF THE DISTRICT COURT BECAUSE UNDER THE UNIQUE CIRCUMSTANCES DOCTRINE, MOVANTS, WHO HAD FILED A MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL, HAD BEEN AFFIRMATIVELY ASSURED THAT THE APPEAL WAS TIMELY BY WRITTEN ORDER OF THE BANKRUPTCY COURT.

4. The U.S. Court of Appeals' opinion in the instant case dated March 4, 1999 sets for the basic facts of the case. Said opinion leaves out one very important fact, to-wit: On January 26, 1996, an order was entered by the Honorable Richard S. Schmidt of the United States Bankruptcy Court, wherein he handwrote the following notation to the bottom of a proposed Order Granting Motion For Extension of Time to File Notice of Appeal: "Moot. Notice of Appeal was timely filed. /s/ Richard Schmidt." A copy of this order is attached hereto as Exhibit 1.

5. Movants also respectfully disagree with the portion of the March 4, 1999 opinion wherein it states that Don Vicente Macias, Inc. filed a motion for extension of time on February 12, 1996. In fact, the February 12, 1996 date appears to have been taken from the district court docket sheet contained at tab 1 in the Record Excerpts. Movants submit that the February 12, 1996 date is the date that said documents were filed with the district clerk, but would assert that the actual motion for extension of time was filed in the bankruptcy court at the same time that the motion for leave to appeal and notice of appeal were tendered to the bankruptcy clerk, which was on January 19, 1996. The motion for extension of time to file notice of appeal and the notice of appeal appear as

exhibits to motions for leave to appeal filed by Don Vicente Macias, Inc. and Ciclon Negro, Inc. on January 19, 1996 with the bankruptcy clerk.

6. In Thompson v. Immigration and Naturalization Service, 375 U.S. 385, 84 S.Ct. 397 (1964), the United States Supreme Court recognized the unique circumstances doctrine in vacating a judgment of the Court of Appeals and in remanding the case with instructions that the case be considered on its merits. Thompson involved a situation where the petitioner performed an act, which, if properly done, postponed the deadline for filing of the appeal, and likewise involved a situation where the trial court concluded that the act had been properly done. 375 U.S. at 387; 84 S.Ct. at 398. In both Thompson and the case at bar,

there was reliance upon the trial court's statement and filed the appeal "within the assumedly new deadline but beyond the old deadline." 375 U.S. at 389; 84 S.Ct. at 399.

7. In Osterneck v. Ernst & Whinney, 489 U.S. 169, 178-179, 109 S.Ct. 987,992-993 (1989), the United States Supreme Court explained the unique circumstances doctrine and held that the Thompson rationale applied only where a party performed an act which, if properly done, would postpone the deadline for filing an appeal and where the party had received specific assurances from a judicial officer that this act was properly done. In the case at bar, Exhibit 1 shows that the bankruptcy judge below, the Honorable Richard S. Schmidt, gave assurance that the appeal notice was timely filed when he

handwrote on the proposed order granting motion for extension of time to file notice of appeal the following notation: "Moot. Notice of Appeal was timely filed. /s/ Richard Schmidt."

8. Other cases have interpreted the unique circumstances doctrine. In Anderson v. Mouradick (In re Mouradick), 13 F.3d 326, 329 (9th Cir.1993), the U.S. Court of Appeals for the Ninth Circuit held that "Under the doctrine of unique circumstances, an appellate court may consider an untimely appeal where "a court has affirmatively assured a party that its appeal will be timely [citations omitted]."

9. Movants pray that the opinion of March 4, 1999 rendered by this Honorable United States Court of Appeals be withdrawn.

10. Movants are unable to clearly ascertain whether Exhibit 1 is a part of the appellate record. Movants would pray that the court grant leave to supplement the appellate record by inclusion of exhibit 1. Movants recognize that this is an unusual request, but in support thereof would note that neither the district court below nor opposing counsel ever contested the jurisdiction of the district court, and would further note that this Honorable Court of Appeals did not order counsel to be prepared to brief the question of the district court's jurisdiction until shortly before oral argument. In the alternative, Movants would request that the Court take judicial notice of the bankruptcy court docket sheets which should reflect the bankruptcy court's entry of January 26, 1996.

WHEREFORE, PREMISES CONSIDERED, Movants pray that the Court withdraw its opinion of March 4, 1999, and for such other and further relief to which Movants may show themselves justly entitled.

Respectfully submitted,

/s/ Kelly K. McKinnis
KELLY K. McKINNIS
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520 Water Tower Centre
612 Nolana Loop
McAllen, Texas 78504
Tel. 956-686-7039
Fax. 956-686-8261

ATTORNEY IN CHARGE OF APPEAL FOR APPELLANT-CROSS APPELLEE/APPELLEE DON VICENTE MACIAS, INC. AND APPELLEE CICLON NEGRO, INC.

CERTIFICATE OF SERVICE

I certify that on March 17, 1999, a true and correct copy of the foregoing was forwarded to Mr. J. Rolando Olvera, 1175 FM 802, Brownsville, Texas 78521.

/s/ Kelly K. McKinnis
Kelly K. McKinnis

EXHIBIT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

ENTERED
JAN 26, 1996

IN RE:	)	CASE NO.
	)	94-21338-B-11
CICLON NEGRO, INC.	)	
Debtor	)	
	)	
CICLON NEGRO, INC.	)	ADVERSARY NO.
	)	94-2204-B
Plaintiff	)	
	)	
v.	)	
	)	
TEXAS GULF TRAWLING CO.,INC. ET AL	)	
Defendants	)	

ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

On this day came on for consideration the Debtor's Motion For Extension of Time to File Notice of Appeal. The court having considered the same finds that this motion should be and is hereby granted.

It is therefore ORDERED that the Debtor's Motion For Extension of Time to File Notice of Appeal is granted and

Debtor is granted ____ days from the signing of this order to file their appeal.

SIGNED this _____ day of _____, 1996.

/s/Moot. Notice of Appeal was timely filed.
/s/Richard S. Schmidt
JAN 26 1996

_____
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-41191

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
Debtor.

DON VICENTE MACIAS, INCORPORATED,

Appellant-Cross-Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED; ZIMCO MARINE,
INCORPORATED; MARINE RAILWAY INCORPORATED,

Appellees-Cross-Appellants.

NO. 98-40029

IN THE MATTER OF: CICLON NEGRO, INC.,
Debtor.

CICLON NEGRO, INC.,

Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant.

NO. 98-40030

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
CICLON NEGRO, INC.,

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant,

versus

DON VICENTE MACIAS, INCORPORATED,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

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March 4, 1999

Before JONES, SMITH, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:

As part of the debtor's chapter 11 bankruptcy proceeding, Texas Gulf Trawling ("Texas Gulf") filed a proof of claim in

the amount of $370,000. In addition to objecting to the proof of claim, the debtors filed adversary proceedings challenging the secured status of Texas Gulf's proof of claim. In two separate proceedings, the bankruptcy court approved Texas Gulf's proof of claim in the amount of $300,000 and ruled that Texas Gulf held a valid lien in that amount. The bankruptcy court's first opinion, rendered in July 1995, was later incorporated into an opinion and final order entered on December 19, 1995.

According to the record, no party filed a notice of appeal within the ten day deadline prescribed by the Federal Rules of Bankruptcy Procedure. See Fed. R. Bank. Proc. 8002(a) ("The notice of appeal shall be filed with the clerk within 10 days of the entry of the judgment, order, or decree appealed from."). Appellant Ciclon Negro filed a Motion for Leave to Appeal on January 19, 1996 and attached as an appendix thereto a Notice of Appeal. In addition, appellant Don Vicente Macias filed a Motion For Leave to Appeal on February 12, 1996. Many months later, in May 1997, the district court denied the debtor's motions, dismissed the appeals, and remanded the matter to the bankruptcy court for continued administration. Under the circumstances, the remand order was superfluous, since refusal to grant the appeals made the bankruptcy court's decision final.

"Failure to file a timely notice [of appeal] deprives the district court of jurisdiction to consider the appeal."

Solomon v. Smith, 41 F.3d 1024, 1026 (5th Cir.1995). Because the district court did not have jurisdiction to review the merits, this court lacks jurisdiction over the merits raised on appeal by Don Vicente Macias and Texas Gulf. See Arbuckle v. First Nat'l Bank of Oxford, 988 F.2d 29, 32 (5th Cir.1993). We therefore affirm the district court's dismissal of the appeal.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FILED
APR 7 1999

NO. 97-41191

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
Debtor.

DON VICENTE MACIAS, INCORPORATED,

Appellant-Cross-Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED; ZIMCO MARINE,
INCORPORATED; MARINE RAILWAY INCORPORATED,

Appellees-Cross-Appellants.

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Debtor.

CICLON NEGRO, INC.,

Appellee,

versus

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant.

NO. 98-40030

IN THE MATTER OF: DON VICENTE MACIAS, INCORPORATED,
CICLON NEGRO, INC.,

TEXAS GULF TRAWLING COMPANY, INCORPORATED,

Appellant,

versus

DON VICENTE MACIAS, INCORPORATED,

Appellee.

Appeals from the United States District Court for the Southern District of Texas, Brownsville

---

ON PETITION FOR REHEARING

Before JONES, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is /s/ denied.

IT IS FURTHER ORDERED that the motion of Don Vicente Macias and Ciclon Negro, Inc. to supplement the record with exhibit 1 is /s/ denied as unnecessary.

ENTERED FOR THE COURT:

/s/ Edith H. Jones
United States Circuit Judge

REHG-2

CLERK'S NOTE:

SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.